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No. 86-1133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TENNECO OIL COMPANY,
Petitioner

v.

KERN OIL & REFINING CO.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD E. SHERWOOD
400 South Hope Street
Los Angeles, Calif. 90071-2899
(213) 669-6000
Counsel of Record for Respondent

Of Counsel:
SUZANNE F. DUFF
MARK L. MOSLEY
O'MELVENY & MYERS

THOMAS L. EVELAND
KERN OIL & REFINING CO.

February 9, 1987

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QUESTIONS PRESENTED

1. Was it an abuse of discretion for the District Court to deny Petitioner's Rule 41(a)(2) motion for voluntary dismissal without prejudice based on the factual finding that Petitioner was "judge shopping?"
2. If the District Court's decision had not been based on the ground of judge shopping, would it have been an abuse of discretion to deny Petitioner's motion based on the extent of legal prejudice to Respondent, including preparation up to the day of trial?
3. Was it an abuse of discretion for the District Court to grant Respondent's Rule 41(b) motion for involuntary dismissal with prejudice after Petitioner's counsel, on instructions from Petitioner, refused to try the case?
4. Is there a conflict among the Circuits on any of the preceding questions?

RULE 28.1 STATEMENT

Respondent Kern Oil & Refining Co. has no subsidiaries that are not wholly owned and is not a subsidiary or affiliate of any other company.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Tenneco Oil Company ("Tenneco") distorts the holdings of the courts below and attempts to fabricate a conflict among the Circuits in order to justify review by this Court. The District Court's decision to deny Tenneco's motion to dismiss without prejudice under Rule 41(a)(2) was based on its conclusion that "Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and [Judge Real] and having the same claim heard by Judge Waters; thus, they constitute impermissible forum shopping." Finding of Fact No. 24, Pet. 27a. The

District Court's decision to grant the Rule 41(b) motion of Respondent Kern Oil & Refining Co. ("Kern") for dismissal with prejudice was based on Tenneco's calculated refusal to try the case after its motion for dismissal without prejudice had been denied. Conclusion of Law No. 5, Pet. 28a. The extent of prejudice to Kern was only one—and not the most important—of the factual determinations made by the District Court in support of its decisions. Pet. 23a-28a. Even had the District Court's decisions been based solely on the extent of prejudice to Kern, as Tenneco contends, the purported conflict among the Circuits as to whether this would be an abuse of discretion simply does not exist.

The Ninth Circuit, in affirming the District Court's actions, held that "[t]he circumstances of this case support the district court's finding that Tenneco was forum shopping," Pet. 19a, and concluded: "In light of Judge Real's findings of fact . . . the dismissal of Count IV did not constitute an abuse of discretion." Pet. 21a. The full Circuit bench, in turn, declined without dissent to rehear *en banc* the panel's unanimous decision. Pet. App. D.

Petitioner cites no authority—and there is none—to support the proposition that "judge shopping" cannot be considered by a district court in deciding whether to grant or deny a Rule 41(a)(2) motion. Instead, Petitioner attempts to reargue this issue of fact here, contending that the District Court's finding was incorrect and that Petitioner had other, legitimate reasons for seeking the dismissal. Pet. 16-18. These fact-bound arguments were rejected by the lower courts on numerous occasions, and Petitioner presents no persuasive reason why they should be retried here.

In granting Respondent's Rule 41(b) motion to dismiss with prejudice, the District Court's exercise of discretion was based on Petitioner's deliberate refusal to commence trial on the appointed day. Pet. 26a-28a. Again Petitioner cites no precedent that such a ruling constitutes an abuse of discretion.

Finally, even if the District Court had based its denial of Petitioner's Rule 41(a)(2) motion exclusively on the extensive and completed trial preparation, as Petitioner alleges, Pet. 7, the petition fails to establish the existence of a conflict among the Circuits justifying this Court's intervention. Tenneco refers to some fourteen cases allegedly supporting its proposition that the Circuits apply differing standards in determining whether a district court's denial of a Rule 41(a)(2) motion constitutes an abuse of discretion. However, ten of the cases involve situations in which plaintiff's motion was *granted*, not denied, or in which the issue was not before the court. These cases are therefore irrelevant to the issue of trial court discretion to *deny* such a motion and, indeed, demonstrate the deference of higher courts to fact-based discretionary rulings. Moreover, the remaining four cases cited by Petitioner in which the Court of Appeals actually decided the relevant question present no conflict. Thus, on the factual record here, there is no conflict among the Circuits and no conceivable basis for the granting of a writ of certiorari.

STATEMENT OF FACTS

Tenneco's lost profits counterclaim was first asserted in August 1981 as Count IV of its counterclaim in this case. CR 5; ER 20-21[1]. The same claim was raised again in March 1983 (nine months earlier than is implied in the Petition, p. 6) as the First Count of Tenneco's counterclaim in Case No. 82-6275, ER 728, and as Count I of its counterclaim in Case No. 81-3253, ER 735, which cases were then pending in the Central District of California and were later consolidated before Judge Waters. By agreement of the parties—not, as Tenneco implies, Pet. 18, at the sole instance of Kern—the price and supply cases were kept separate.

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[1] Citations to "CR" are to the Clerk's Record, with the number following being the docket number assigned by the District Court Clerk. Citations to "ER" are to the Excerpt of Record and Supplementary Excerpt of Record filed with the Court of Appeals. Citations to "RT" are to the Reporter's Transcript.

From 1981 through the discovery cutoff in September 1983, the parties took extensive discovery in this case into the lost profits counterclaim. Tenneco pushed for an early trial date, and a condition of Kern's June 1983 substitution of counsel was that Kern would not seek to delay trial, then set for September 1983.

After discovery was completed, Kern moved for summary judgment on Count IV based on the *force majeure* clause of the relevant contracts between the parties. CR 74. Tenneco, apparently satisfied with its discovery on Count IV, opposed the motion on the merits, filed a cross-motion for summary judgment, CR 82, and did not seek either to reopen discovery or to rely on Rule 56(f). In February 1984 Judge Marshall, before whom the case was then pending, granted Kern's motion and dismissed Count IV. CR 99. Tenneco immediately began discovery into the identical lost profits counterclaim in the cases before Judge Waters, duplicating depositions and document requests already made in this case. ER 760; ER 762. In March 1984 Tenneco filed with Judge Marshall a motion for reconsideration of the summary judgment decision, CR 109; ER 235, and for the first time sought, in a mislabeled motion to "non-suit," to dismiss Count IV without prejudice. ER 249.

In its motion, Tenneco stated that it sought to dismiss Count IV so that it could pursue that claim in the cases pending before Judge Waters. *Id.* Nevertheless, its motion was not filed until *after* Judge Marshall had ruled adversely to it, *after* its lost profits counterclaim had been pending in the cases before Judge Waters for one full year, and *after* its lost profits counterclaim had been pending in this case for almost three years. Tenneco stated that it had pursued its lost profits counterclaim in this case rather than in Judge Waters' cases "because this case was going to trial before the other cases." ER 251. Kern, in its opposition to the motion, CR 120; ER 255,

pointed out Tenneco's forum shopping and the potential for prejudice to Kern. ER 272-77. Judge Marshall took the motions for reconsideration and "non-suit" under submission.

As of early March 1984, the case was set for trial before Judge Marshall on April 3. CR 92. The parties had filed their Memoranda of Contentions, CR 95; CR 101, Witness Lists, CR 96; CR 98, and Joint Exhibit List, CR 97, in February, before Judge Marshall dismissed Count IV, and had thoroughly addressed Count IV in the Memoranda and identified witnesses and exhibits specific to that claim. After Judge Marshall granted summary judgment, her clerk informed the parties that Judge Marshall would be unable to try the remainder of the case before early June and was considering transferring it to a different judge for trial. Kern proposed that the parties stipulate to postpone the trial until Judge Marshall could hear it, ER 776, but Tenneco insisted on trying the case "at the earliest possible setting." ER 777. Additionally, Tenneco sought—unsuccessfully—permission to delay filing its intended motions for reconsideration and "non-suit" until the new judge was named. Pet. 20a. On March 12, Tenneco filed its motions for reconsideration and non-suit, and on March 20, 1984, Judge Marshall transferred the case to Judge Real for trial, retaining the pending motions. CR 110; ER 343.

In June 1984 the case (minus Count IV) was tried to Judge Real, who ruled in favor of Kern on all issues before him. CR 506; ER 386. After conclusion of trial, the parties learned that Judge Marshall had vacated her summary judgment decision, CR 500, thus reinstating Count IV for trial. But Judge Marshall had not ruled on Tenneco's motion to non-suit. On July 30, Judge Real *sua sponte* set trial of "the *force majeure* issue" for August 20. CR 508; ER 391. On August 3 Judge Marshall issued a minute

order denying Tenneco's motion to non-suit Count IV, CR 507; ER 390, and on August 6, Judge Real issued an Order stating that the August 20 trial would encompass all issues relating to Count IV, including all defenses raised by Kern and the issue of Tenneco's damages. CR 509; ER 392.

On August 13—one week before the date set for trial —Tenneco filed with Judge Real an *Ex Parte* Application for Voluntary Dismissal of Count IV Without Prejudice. ER 146. Again, Tenneco stressed the fact that the same lost profits counterclaim was pending before Judge Waters. ER 148-49. Kern responded that Tenneco's application was an impermissible horizontal appeal of Judge Marshall's denial of the motion to non-suit, emphasized that Tenneco was "judge shopping," pointed out the extent of Kern's preparation for trial on August 20, and noted that Judge Real's decision at trial of Count IV would eliminate any need to try the lost profits counterclaim in the cases pending before Judge Waters. ER 203.

During the week of August 13, Tenneco and Kern submitted trial briefs, CR 512; CR 515; CR 518, proposed findings of fact and conclusions of law, *see* ER 276, a joint supplemental exhibit list, CR 519, witness lists, CR 514; CR 517, and pretrial conference orders, CR 513; CR 511. The parties identified, exchanged and assembled court sets of the trial exhibits. Tenneco designated testimony from the depositions of twenty-six individuals. Kern carefully reviewed all the testimony and exhibits designated by Tenneco and submitted counter-designations and objections. In all, thirty-four depositions (thirty-seven volumes of testimony) were marked and lodged with Judge Real for trial of Count IV. ER 770-71.

On August 20 the parties appeared before Judge Real for trial. Judge Real heard argument on Tenneco's *Ex Parte* Application for Voluntary Dismissal, and Tenneco once more made it very plain that it sought to dismiss Count IV from this case for the purpose of trying its lost

profits counterclaim to Judge Waters. Judge Real denied Tenneco's application and informed the parties that trial of Count IV would commence on August 22 or 23. 8/20-22/84 RT:7.

In the late afternoon of August 20, Tenneco filed an emergency petition with the Ninth Circuit seeking a writ of mandamus or prohibition (and a stay pending determination of the writ issue), requesting that court to compel Judge Real to vacate the trial setting and to dismiss Count IV without prejudice. Once again, Tenneco emphasized the fact that the very same lost profits counterclaim was pending before Judge Waters. Late in the afternoon of August 21 the parties learned that the Ninth Circuit had denied Tenneco's petition for a stay, thus effectively denying the petition for a writ. ER 772.

At 9:00 a.m. the following morning, August 22, 1984, the District Court convened for trial of Count IV. Tenneco once again asked Judge Real to be allowed to dismiss its lost profits counterclaim without prejudice. Tenneco's counsel, upon being requested by Judge Real to speak as an Officer of the Court, admitted that Tenneco intended to pursue the same claim before Judge Waters. Finding that Tenneco was engaging in forum shopping, Judge Real denied Tenneco's motion and invited Tenneco to present its opening statement. Counsel for Tenneco then advised Judge Real that his client had told him that he had "no authority to proceed" or to "put on any evidence." He stated that he had "no witnesses," "no documents," and "no authority at this time at all from Tenneco to participate in any trial." Upon Kern's motion, Judge Real ordered dismissal of the lost profits counterclaim with prejudice against Tenneco pursuant to Fed. R. Civ. P. 41(b). 8/20-22/84 RT:14-21.

On September 4, Judge Real signed an Order Denying Tenneco's Motion for Voluntary Dismissal, CR 520; ER 416, an Order and Judgment on Count IV (dismissing it

with prejudice against Tenneco and granting judgment "on the merits" in favor of Kern), Pet. 30a-31a, and Findings of Fact and Conclusions of Law regarding Count IV, Pet. 22a-29a.[2]

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[2] The Findings and Conclusions state, *inter alia*, that:

Tenneco had filed "the same counterclaim" in the cases pending before Judge Waters, Finding of Fact 2;

"Tenneco could have moved for dismissal of Count IV without prejudice at least as early as March 1983, the time when it filed its lost profits counterclaim in Cases No. 82-6875 and 81-3253," Finding of Fact 9;

"Tenneco's repeated requests to be allowed to dismiss Count IV without prejudice were made for the purpose of avoiding Judge Marshall and this Court and having the same claim heard by Judge Waters" and constituted "impermissible forum shopping," Finding of Fact 24;

"Kern would be prejudiced by a voluntary dismissal of Count IV without prejudice because of, *inter alia*, the extensive discovery taken in this case, the burden of potentially duplicative discovery in the cases before Judge Waters, and its intensive preparation for trial on August 20, and the fact that Count IV arising out of the contract before the Court in the first trial makes Count IV a compulsory counterclaim in this case," Finding of Fact 25;

"Because this Court is already familiar with some of the issues to be tried regarding the lost profits counterclaim, it would be against the interests of the economies of the parties and judicial economy to allow dismissal of Count IV without prejudice," Finding of Fact 26;

"Tenneco would not be prejudiced by having to litigate Count IV in this case because it has had, *inter alia*, ample opportunity to conduct discovery into the facts of the lost profits counterclaim, adequate notice of the issues to be tried, and sufficient opportunity to prepare for trial," Finding of Fact 27;

"[O]n the facts of this case Tenneco is not entitled to ... dismissal [without prejudice]," Conclusion of Law 3;

"Tenneco's lost profits counterclaim is a compulsory counterclaim under Fed. R. Civ. P. 13(a)," Conclusion of Law 4; and

"Due to Tenneco's failure and refusal to begin trial of Count IV on August 22, Kern is entitled to judgment on the merits and dismissal of Count IV of the Counterclaim with prejudice to Tenneco pursuant to Fed. R. Civ. P. 41(b) and Local Rule 27," Conclusion of Law 5.

Tenneco appealed the Order and Judgment on Count IV to the Ninth Circuit. On June 24, 1986, the Ninth Circuit affirmed the District Court's decision. Pet. App. A. On September 11, 1986, the Court of Appeals denied Tenneco's petition for rehearing and the suggestion for rehearing *en banc*. Pet. App. D.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Is a Routine Case Where a Court of Appeals Has Affirmed a District Court's Exercise of Discretion in Denying a Rule 41(a)(2) Motion for Dismissal Without Prejudice.

The standard for review of a district court's denial of a Rule 41(a)(2) motion is, of course, abuse of discretion. *See, e.g., Andes v. Versant Corporation*, 788 F.2d 1033, 1036-37 (4th Cir. 1986); *McCants v. Ford Motor Company, Inc.*, 781 F.2d 855, 857 (11th Cir. 1986); *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981); *Williams v. Ford Motor Credit Company*, 627 F.2d 158, 160 (8th Cir. 1980); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *see also* 5 Moore's Federal Practice ¶41.05[3] (2d ed. 1986). Petitioner acknowledges this standard, Pet. 19-20, but tries to sidestep it by suggesting that the only consideration before Judge Real when he decided to deny its motion to dismiss was the extensive amount of preparation for trial. According to Petitioner, "[t]he question at issue in this case can be so stated: Is the mere expense of litigation and preparation for trial 'plain legal prejudice' to a defendant sufficient to justify denial of a motion for voluntary dismissal under Rule 41(a)(2)?" Pet. 20.

This misstates the holdings that Petitioner seeks to have reviewed by this Court. Far from being based exclusively on trial preparation expense, Judge Real's decision was grounded on Tenneco's "judge shopping,"

supported by the extent of prejudice to Kern and other considerations. Pet. 27a-28a. The Ninth Circuit recognized the foundation of the District Court's decision, questioning the extent of prejudice to Kern, Pet. 21a, but nonetheless holding that the District Court's decision was supported by the Findings of Fact—*i.e.*, the findings relating to Tenneco's forum shopping,[3] *id.* When Judge Real decided the motion, he knew that, until Judge Marshall ruled against Tenneco in March 1984, Tenneco had pushed vigorously for an early trial date for its counterclaim before her, to the point of insisting that Kern's substitution of counsel in June 1983 not be used to delay the trial. He knew that Tenneco had not made its motion to dismiss in Judge Marshall's court until after she had ruled against Tenneco on Kern's summary judgment motion, and only after Tenneco had sought unsuccessfully to delay filing its motion to dismiss until a new judge was named. He knew that Tenneco had not made its motion to dismiss in his court until after he, in turn, had ruled against Tenneco in the June 1984 trial of Kern's affirmative claims. He was already familiar with some of the issues relating to the counterclaim because of the June 1984 trial, and he knew that rebriefing and trying these issues before Judge Waters would represent a substantial waste of the parties' and the judiciary's resources. Pet. 27a. He believed—and found —that Tenneco's acknowledged efforts to dismiss so that it could try the counterclaim before Judge Waters constituted another instance of "impermissible forum shopping." Thus, his decision denying Tenneco's motion for voluntary dismissal was a decision squarely within the discretion of the District Court. The Ninth Circuit's affirmance was a routine confirmation of that exercise of discretion.

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[3] Hence, the Ninth Circuit did not, as Petitioner contends, Pet. 15 n.9, back away from its ruling in *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143 (1982). In fact, it relied on that ruling. Pet. 18a.

II. The District Court Did Not Abuse Its Discretion by Considering the Fact that Petitioner Was "Judge Shopping."

Petitioner does not—and indeed cannot—dispute that Tenneco's judge shopping could appropriately be considered by the District Court when exercising its discretion under Rule 41(a)(2). *See, e.g., Conafay v. Wyeth Laboratories*, 793 F.2d 350, 353 (D.C. Cir. 1986)(movant's "good faith" recognized as a factor); *Puerto Rico Maritime Shipping Authority, supra*, 668 F.2d at 49 ("good faith" of movant considered in affirming dismissal without prejudice); *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856, 857 n.1 (8th Cir. 1975)(movant's forum shopping sufficient reason for denying motion); *Pace v. Southern Express Company*, 409 F.2d 331 (7th Cir. 1969)(movant's conduct of litigation recognized as a factor); *Kennedy v. State Farm Mutual Automobile Insurance Company*, 46 F.R.D. 12, 15 (E.D. Ark. 1969)(movant's forum shopping sufficient reason for denying motion); *Southern Maryland Agricultural Association v. United States*, 16 F.R.D. 100, 102 (D. Md. 1954)(motion denied because movant was forum shopping); *see also* 5 Moore's Federal Practice ¶41.05[1] (2d ed. 1986) and authorities cited therein.

Federal policy against such judge shopping is clear and unequivocal. *See, e.g., McCuin v. Texas Power & Light Company*, 714 F.2d 1255, 1261-65 (5th Cir. 1983); *Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d 1197, 1203 (2d Cir. 1970); *United States v. Kelley*, 519 F. Supp. 1029 (D. Mass. 1981). Petitioner grudgingly acknowledges that the District Court's holding was based on Tenneco's judge shopping, Pet. 16, but then argues that Tenneco "simply sought to try its supply counterclaim in the supply litigation," *id.*, attempting to relitigate a factual proposition that the District Court considered and rejected, Pet. 27a. Petitioner completely ignores the fact that Judge Real's finding was expressly affirmed by the Ninth Circuit,

which held that "the district court was justified in finding that Tenneco was forum shopping," Pet. 20a, and that Judge Real's decision was supported by the record, Pet. 19a-21a.

Since the decisions below were premised on Judge Real's finding that Tenneco was judge shopping, the only legitimate basis for the present petition would be that this finding was "clearly erroneous"—a proposition not even argued by Petitioner.

III. On the Facts Of This Case, the District Court Did Not Abuse Its Discretion in Finding Sufficient Legal Prejudice to Respondent to Justify Denial of Petitioner's Motion.

Even if forum shopping had not been a primary basis for the District Court's decision denying Tenneco's motion, Judge Real's findings, based on the record before him, amply support his exercise of discretion. Although Tenneco would have this Court believe that the only factor considered by the District Court was "the expense of preparation for trial," Pet. (i), 7, the District Court in fact considered "the burden of potential duplicative discovery," the familiarity of the Court "with some of the issues to be tried," and the lack of prejudice to Tenneco from having to litigate the matter in light of its "ample opportunity to conduct discovery into the facts of the lost profits counterclaim, adequate notice of the issues to be tried, and sufficient opportunity to prepare for trial." Pet. 27a-28a. These findings, together with the finding of forum shopping, the timing of the motion and the "deference" to which Judge Marshall's earlier denial "was entitled," Pet. 21a, provided an abundant basis for Judge Real's decision to deny the motion and the Ninth Circuit's affirmance of that exercise of discretion.

IV. The District Court Did Not Abuse Its Discretion in Dismissing Petitioner's Counterclaim With Prejudice When Petitioner Refused to Put On its Case.

In ruling on an involuntary dismissal with prejudice under Rule 41(b) for failure to prosecute, the proper focus of a district court is on plaintiff's conduct, not on prejudice to the defendant. *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956); *Hicks v. Bekins Moving & Storage Company*, 115 F.2d 406 (9th Cir. 1940). On the very day of trial, Tenneco flatly refused to proceed with its case. 8/20-22/84 RT: 14-21, Pet. 27a. As the Ninth Circuit confirmed, Tenneco proceeded "at its peril" in taking a dismissal with prejudice under Rule 41(b) rather than proceeding with trial. Pet. 19a, quoting from *Blue Mountain Construction Company v. Werner*, 270 F.2d 305, 307 (9th Cir. 1959), *cert. denied*, 361 U.S. 931 (1960) (affirming dismissal with prejudice when plaintiff refused to proceed after its motion for voluntary dismissal was denied); *cf. Paturzo v. Home Life Insurance Company*, 503 F.2d 333 (4th Cir. 1974) (plaintiff moved for voluntary dismissal on the very morning of trial, the motion was denied, and the Court of Appeals upheld the denial "in view of the advanced stage of the proceedings").

V. There Is No Conflict Among the Circuits Justifying the Grant of a Writ of Certiorari.

It is clear that the District Court's denial was grounded on much more than the "mere" expense of preparation for trial. In the particularized factual circumstances of this case, including Petitioner's blatant forum shopping, there is no conflict of Circuits that would remotely warrant review by this Court. Moreover, even if Tenneco were correct and Judge Real had based his denial of Tenneco's motion to dismiss exclusively on the expense of preparation for trial, Petitioner has not shown that there is a conflict among the Circuits on that issue.

Petitioner refers to numerous cases which purportedly support its proposition that other Circuits have held that the expense of preparing for trial does not constitute prejudice to the defendant sufficient to justify denial of a motion for voluntary dismissal. However, all but four of the cited cases either do not address the question or address the wholly different question of whether the district court had abused its discretion in *granting* a motion to dismiss without prejudice under Rule 41(a)(2).[4] Merely because a district court did not abuse its discretion in *granting* a motion to dismiss does not mean that the

[4] The other cases cited by Petitioner in support of its proposition that there is a conflict among the Circuits are: *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986) (dismissal granted and upheld as within the district court's discretion); *Cauley v. Wilson*, 754 F.2d 769 (7th Cir. 1985) (movant contested award of attorney's fees on appeal; issue of district court's discretion in granting dismissal was not at issue); *Kern v. TXO Prod. Corp.*, 788 F.2d 968 (8th Cir. 1984) (dismissal granted and upheld as within the district court's discretion); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983) (non-settling defendants had no standing to challenge plaintiff's settlement with and dismissal of settling defendant; Rule 41(a)(2) examined only for purposes of analogy); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46 (1st Cir. 1981) (district court's dismissal affirmed as no abuse of discretion); *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980) (district court abused its discretion by granting dismissal where trial had been completed and judgment notwithstanding the verdict was pending); *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) (dismissal granted by district court subject to exceptional and unorthodox conditions; the conditions, but not the dismissal itself, found to constitute an abuse of discretion); *Noonan v. Cunard S.S. Co.*, 375 F.2d 69 (2d Cir. 1967) (district court abused its discretion by granting dismissal to allow movant to cure failure to make jury demand); *Stern v. Barnett*, 452 F.2d 211 (7th Cir. 1971) (district court abused its discretion by allowing plaintiff bankrupt to dismiss when dismissal would seriously affect creditors' rights); *Piedmont Interstate Fair Ass'n v. Bean*, 209 F.2d 942 (4th Cir. 1954) (district court abused its discretion when it granted dismissal after answer had been filed, discovery had been made and court had expressed its opinion on the merits favorable to defendant).

court would have abused its discretion had it *denied* the motion. To rule otherwise would eliminate discretion entirely, since "[t]he very concept of discretion presupposes a zone of choice within which the trial courts may go either way." *Kern v. TXO Production Corporation*, 738 F.2d 968, 971 (8th Cir. 1984). Indeed, the very cases cited by Tenneco demonstrate the proper reluctance of appellate courts to interfere with trial court exercises of discretion under Rule 41(a)(2) based on the particular facts before them.

The four cited cases in which a court of appeals addressed the question of whether the district court had abused its discretion when it *denied* a Rule 41(a)(2) motion to dismiss without prejudice do not conflict with the Ninth Circuit's decision here.

As Petitioner accurately points out, *Andes v. Versant Corporation*, 788 F.2d 1033 (4th Cir. 1986), strongly supports the proposition that substantial expenditures alone can constitute prejudice to the defendant sufficient to justify denying plaintiff's motion to dismiss without prejudice. In *Andes*, Chief Judge Winter reasoned that the "significant expenses" incurred by defendants "not only in responding to Andes' complaint and filing motions and memoranda in support of summary judgment, but also by incurring substantial costs of discovery through depositions, production of documents, and the obtaining of expert opinions on English law," constituted "a sufficient basis for denying Andes' 41(a)(2) motion." 788 F.2d at 1036. The Court of Appeals concluded: "we cannot say that the district court abused its discretion in refusing to dismiss without prejudice." *Id.* at 1036-37.

In *Conafay v. Wyeth Laboratories*, 793 F.2d 350 (D.C. Cir. 1986), the D.C. Circuit reached no holding on the issue of whether the district court had abused its discretion in refusing to grant plaintiff's motion to dismiss. "Without assaying the lengths and depths of decisional law in this

respect and without adopting any general rule of law for this Circuit," *id.* at 353, the Court remanded with instructions "to provide reasons for the [district] court's determination." *Id.* at 354. By contrast, Judge Real provided detailed reasons for his determination, Pet. 23a-28a, and the Court of Appeals found them sufficient, Pet. 21a.

Durham v. Florida East Coast Railway Company, 385 F.2d 366 (5th Cir. 1967), is entirely inapposite. The *Durham* decision was based on the perceived obligation of plaintiff's counsel to its client to refuse to proceed to trial after counsel had negligently failed to develop the case. The court found that the effect of the dismissal "was to visit the sins of the lawyer upon his client." *Id.* at 367. Here, the District Court specifically found that Tenneco had sufficient opportunity to prepare for trial, Pet. 28a, and Tenneco itself, as part of its transparent strategy of judge shopping, withdrew from its counsel all "authority . . . to participate in any trial," 8/20-22/84 RT:14-21. In such circumstances, the sanction of dismissal is placed "squarely where it belong[s]." *Redac Project 6426, Inc. v. Allstate Insurance Company*, 412 F.2d 1043 (2d Cir. 1969). The *Durham* decision is simply irrelevant.

Finally, in *Alamance Industries, Inc. v. Filene's*, 291 F.2d 142 (1st Cir. 1961), a "leading case" relied on by Petitioner, Pet. at 9-10, the facts lend no support to the proposition that an extensive investment in time and money preparing for trial cannot justify denial of a Rule 41(a)(2) motion. In that case, the facts are almost the exact reverse of the situation here. There, the case in which the voluntary dismissal was denied was the one that had lain dormant until the defendant pushed for a quick trial; here, the case in which the voluntary dismissal was denied was the one that was fully prepared for trial. There, trial of the same issue would have been inevitable in any event, *id.* at 146; here, there would be, and indeed

was, no need for trial of the claim in Judge Waters' cases because of the *res judicata* effect of a decision on Count IV in this case. There, the other case had been the one first filed, and it was in *that* case that the overwhelming amount of time and effort had been spent in preparation; here, this case was filed well before the cases pending before Judge Waters, and it is in *this* case where all the money and time had been spent. There, the court "did not even purport to exercise discretion," *id.* at 147; here, the district court considered and resolved problems of comity, forum shopping, prejudice to Kern and judicial administration. The difference between *Alamance* and this case is a perfect example of why Rule 41(a)(2) motions for dismissal are relegated to the discretion of the trial courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD E. SHERWOOD
Counsel of Record for Respondent

Of Counsel:
SUZANNE F. DUFF
MARK L. MOSLEY
O'MELVENY & MYERS

THOMAS L. EVELAND